

U.S. Bank, N.A. v Sacher

2007 NY Slip Op 33114(U)

September 26, 2007

Supreme Court, New York County

Docket Number: 0108203/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Justice

Index Number : 108203/2007

U.S. BANK, N.A.

VS.

SACHER, ROBERT P.

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 108203-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

OCT 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept 26, 2007

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

U.S. BANK, N.A., AS TRUSTEE, ON BEHALF OF THE
HOLDERS OF THE CSMC MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES, SERIES 2007-1,

Plaintiff,

-against-

ROBERT P. SACHER, SUSAN SACHER, BOARD OF
MANAGERS OF 175 EAST SECOND STREET
CORPORATION, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE FOR
WALL STREET MORTGAGE BANKERS LTD. d/b/a
POWER EXPRESS, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, PEOPLE OF THE STATE
OF NEW YORK, SELECT PORTFOLIO SERVICING, INC.,
JOHN DOE (Said name being fictitious, it being the
intention of Plaintiff to designate any and all occupants of
premises being foreclosed herein, and any parties,
corporations or entities, if any, having or claiming an
interest or lien upon the mortgaged premises),

Defendants.

Decision/Order

Index No.: ~~110033007~~
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Plt's motion [sj] w/SJS affirm, JS affid, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to foreclose a mortgage executed by defendants Robert P.
Sacher and Susan Sacher (the "Sacher defendants") on October 24, 2006. Plaintiff
U.S. Bank, N.A., as Trustee, on behalf of the holders of the CSMC mortgage-backed

pass-through certificates, series 2007-1 ("plaintiff") moves for an order: (1) granting summary judgment on the complaint and dismissing the Sacher defendants' answer; (2) granting permission to treat said answer as a limited notice of appearance; (3) to amend the caption by substituting Thomas Alberto ("Alberto") and Jessica Sicca ("Sicca"), as party defendants in place of "John Doe;" and (4) appointing a referee to determine the amount due to plaintiff and to determine whether the premises being foreclosed can be sold in parcels. CPLR §§ 3212; 3025(b).

Proof of service of the underlying summons and complaint on all defendants, as well as proof of service of the instant motion on the Sacher defendants, has been provided to the court. The Sacher defendants have answered the complaint. Defendants People of the State of New York, and Commissioner of Taxation and Finance have appeared in this action, and waived service of all papers and notices of all proceedings herein except notice of application for discontinuance of the underlying action, referee's report of sale and notice of all proceedings to obtain surplus monies. All other defendants have not appeared in or answered this action and their time to do so has expired and has not been extended by the court. Further, none of the defendants have opposed the instant motion.

Summary judgment relief against the Sacher defendants may be considered by the court since issue has been joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

On October 24, 2006, the Sacher defendants executed a note in the amount of \$444,500.00 at 8.5000% interest to Wall Street Mortgage Bankers, Ltd, d/b/a Power Express ("Wall Street"). The note was secured by a mortgage on 175 East 2nd Street,

[* 4]

Unit 1A, New York, NY (the "premises"), also executed on October 24, 2006 by the Sacher Defendants to Wall Street with Mortgage Electronic Registration Inc. as mortgagee of record for purposes of recording the mortgage. The mortgage was thereafter assigned to plaintiff by way of an assignment of mortgage filed June 13, 2007.

Based on the affidavit of Amy Weis, an officer of Select Portfolio Servicing, Inc., the loan servicer, the last payment made by plaintiff was applied to the monthly payment due on February 1, 2007. The Sacher defendants defaulted on March 1, 2007, and because of said default, the loan was accelerated. There is now due and owing the principal balance of \$443,686.42, plus interest from February 1, 2007 and late charges of \$273.40.

Based on the affirmation of Susan M. Silleman, Esq., plaintiff avers that two tenants were found at the premises, to wit: Alberto and Sicca . The summons and complaint were personally served on Alberto on July 14, 2007. Sicca was served by delivering a copy of the summons and complaint to Alberto on July 14, 2007, a person of suitable age and discretion, and following up with a mailing on July 18, 2007. CPLR § 308.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary

judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

Here, plaintiff's burden on this motion is to establish a *prima facie* case by proof of the note, mortgage, assignment and defendant's default. Bercy Investors, Inc. V. Sun, 239 A.D.2d 161 (1st Dept. 1997). The court finds that plaintiff has established *prima facie* entitlement to summary judgment on the complaint. As the Sacher defendants' answer does not deny that they are in default of the aforementioned note, but only contains general denials and boilerplate affirmative defenses, and the Sacher defendants' have failed to oppose this motion, the Sacher defendants have failed to demonstrate the existence of a triable issue of fact. Federal Home Loan Mortg. Corp. V. Karastathis, 237 A.D.2d 558 (2nd Dept. 1997). Accordingly, plaintiff's motion for summary judgment on the complaint is hereby granted.

Plaintiff also seeks an order striking the Sacher defendants' answer, however, plaintiff has not asserted any proper grounds to strike the answer [CPLR § 3126].

[* 6]
Moreover, the answer, which joins issue, is the predicate for summary judgment, which the court has granted. CPLR § 3212; Brill v. City of New York, *supra*.

Plaintiff has established that Alberto and Sicca are tenants currently residing at the premises. Therefore, plaintiff's motion for leave to amend the caption by substituting Alberto and Sicca as party defendants in place of "John Doe" is granted, on the condition that plaintiff serve a copy of this decision/order on both Alberto and Sicca within 30 days of entry, as well as any other party entitled to notice.

Further, plaintiff's motion for an order appointing a referee is also granted. Michael F. Schwartz at 114 West 47th Street, 19th Floor, New York, N.Y. is hereby appointed as referee to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided for in the Mortgage upon which this action was brought, to examine and report, by documentary evidence submitted in lieu of a hearing, whether or not the Mortgaged Premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on the complaint is hereby granted; and it is further

ORDERED that plaintiff's motion to amend the caption by substituting Thomas Alberto and Jessica Sicca as party defendants in place of "John Doe" is hereby granted on the condition that plaintiff serve a copy of this decision/order on both Alberto and Sicca within 30 days of entry, as well as any other party entitled to notice; and it is

further

ORDERED that plaintiff's motion for an order appointing a referee is granted and Michael F. Schwartz at 114 West 47th Street, 19th Floor, New York, N.Y. is hereby appointed as referee to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided for in the Mortgage upon which this action was brought, to examine and report, by documentary evidence submitted in lieu of a hearing, whether or not the Mortgaged Premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed; and it is further

ORDERED that plaintiff's motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
September 26, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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